US Foods, Inc. *and* General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters. Cases 28–CA–156203 and 28–CA–160985

December 1, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On March 10, 2016, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.[2]

The General Counsel excepts to the judge's dismissal of an allegation that the Respondent violated Section 8(a)(1) by threatening employees with job loss if they engaged in a strike. As explained below, we find merit in the General Counsel's exception.

The Respondent and General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union) began bargaining for a new collective-bargaining agreement in late May 2015. On October 3, 2015, the Union informed the Respondent that the unit employees had voted to reject the Respondent's last, best, and final offer and to authorize a strike.[3] On October 5, 2015, the Respondent's Transportation Manager, Michael Tavenner, approached employee Jason Peterson, and Peterson gave the following testimony regarding the conversation that ensued:

> [Tavenner's] exact words to—as I recall is we want—if this continues about people not showing up to work or striking, that people will—I don't want anybody to lose their jobs. And then he just waited for a couple seconds and said, "well, I don't want to lose my job either."

Tavenner did not testify. The judge found Peterson's testimony too "confused" to establish an unlawful threat. We disagree.

An employer's statement violates Section 8(a)(1) if "it has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights." *Joseph Chevrolet, Inc.*, 343 NLRB 7, 9 (2004), enfd. 162 Fed. Appx. 541 (6th Cir. 2006). The Board has found that an employer's statements that link employee strike activity to job loss are unlawful. See, e.g., *Stahl Specialty Co.*, 364 NLRB No. 56, slip op. at 1 fn. 1 (2016); *Wild Oats Markets, Inc.*, 344 NLRB 717, 718, 740 (2005); *Baddour, Inc.*, 303 NLRB 275, 275 (1991). Tavenner's statement conveyed to employees that "los[ing] their jobs" was a consequence of striking. Thus, we reverse the judge and find that Tavenner's October 5 statement to Peterson violated Section 8(a)(1).[4]

ORDER

The National Labor Relations Board orders that the Respondent, US Foods, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[1] We note that the Board applies *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), to assess refusal-to-hire and refusal-to-consider allegations. Applying *FES*, we find that the judge correctly dismissed the allegation that the Respondent unlawfully refused to hire Elliott Garrett. For the same reasons, we dismiss the allegation that the Respondent unlawfully refused to consider Garrett. In dismissing those allegations, we do not rely on the judge's characterization of Garrett's union activity as "extremely limited."

Having adopted the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally changing its established past practice regarding the parties' grievance procedure, we find it unnecessary to pass on the judge's finding that this unilateral change did not also violate Sec. 8(a)(4) because finding that additional violation would not materially affect the remedy.

[2] We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). We shall substitute a new notice to conform to the Order as modified.

[3] The employees never actually went on strike because the Respondent agreed to return to the bargaining table.

[4] Member Miscimarra would dismiss the allegation that the Respondent threatened employees with job loss if they engaged in a strike. Regarding this allegation, the sole evidence was the testimony of employee Jason Peterson. First, Peterson testified that Tavenner said "something about some union guy wants another guy's job." Next, Peterson testified that Tavenner said, "If a vote doesn't happen or something to do with people not coming to work that, you know, people lose their jobs," and then added, "I [Tavenner] won't have a job." Counsel for the General Counsel then stated that she "was a little bit confused" by Peterson's testimony, and she asked Peterson to "clarify what the part about—about you not having a job was." Peterson then testified as set forth above in the text. The judge dismissed the threat allegation, finding that "Tavenner said that if employees don't come to work, 'people lose their jobs' and that he (Tavenner) could lose his job, but there was no clear threat in his statement." Member Miscimarra agrees with this finding, and he would affirm the judge's dismissal of the threat allegation.

(a) Threatening employees that they will not be rehired and that employees will not be permitted to transfer to the facility because of their union or concerted activities.

(b) Threatening employees with job loss if they engage in a strike.

(c) Changing the terms and conditions of employment of its unit employees without first notifying the General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union) and giving it an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All regular full-time and part-time drivers, warehouse workers, fleet and warehouse maintenance mechanics, fuelers, spotters and leads employed at its following Arizona locations: Phoenix, Tucson, Sierra Vista, Show Low, Payson, Flagstaff, Prescott, Lake Havasu City, Kingman and Yuma, Arizona; excluding stockyard division employees, janitors, cycle counters, inventory control employees, and all other employees, office-clericals, guards, and other supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, notify the Union, in writing, that it is an established term and condition of employment at the Phoenix facility for union stewards to be allowed to remain at grievance meetings that go past their startup times, and to be paid for that time, and that this procedure will not be changed without prior bargaining with the Union.

(c) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 1, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that you will not be hired or rehired or be permitted to transfer from our Los Angeles, California facility to our Phoenix, Arizona facility because of your union activities on behalf of General Teamsters (Excluding Mailers) State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union) or any other labor organization.

WE WILL NOT threaten you with job loss if you engage in a strike.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All regular full-time and part-time drivers, warehouse workers, fleet and warehouse maintenance mechanics, fuelers, spotters and leads employed at its following Arizona locations: Phoenix, Tucson, Sierra Vista, Show Low, Payson, Flagstaff, Prescott, Lake Havasu City, Kingman and Yuma, Arizona; excluding stockyard division employees, janitors, cycle counters, inventory control employees, and all other employees, office-clericals, guards, and other supervisors as defined in the Act.

WE WILL notify the Union, in writing, that union stewards are permitted to remain at grievance meetings past their startup time, and to be paid for this time until the conclusion of the meetings.

US FOODS, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-156203 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Kristin White, Esq. and *Kyler Scheid, Esq.*, for the General Counsel.

Joseph Turner, Esq. and *Karla Sanchez, Esq.*, Seyfarth Shaw LLP, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Phoenix, Arizona on January 20 and 21, 2016. The consolidated complaint, issued on November 16, 2015,[1] and was based upon unfair labor practice charges and an amended charge filed by General Teamsters, State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union), on July 17, September 23, and September 29; the complaint was amended on January 14, 2016, pursuant to a Notice of Intent to Amend. There are three 8(a)(1) allegations: it is alleged that on about July 12, US Foods, Inc. (Respondent), by Albert Padilla, at its facility, threatened its employees with not being rehired, and that the Respondent would not accept transfers to its facility because the employees engaged in union and concerted activities; that on about July 28, by Keith LaPlant, threatened its employees by telling them that they were removed from training duties because they engaged in union and concerted activities; and on about October 5, by Michael Tavenner, threatened employees by telling them that they would be discharged because they engaged in union and concerted activities. Padilla, LaPlant, and Tavenner are admitted supervisors and/or agents of the Respondent. It is further alleged that the Respondent violated Section 8(a)(3) of the Act in April by removing employee Ryan Proctor from training duties and by refusing to consider for hire, or hire, Elliot Garrett on about May 27, because of their union or concerted activities. Finally, it is alleged that on about July 28, the Respondent changed its practice of allowing union stewards to participate in grievance meetings after the start of their scheduled shift, and be paid for the time, without prior notice to, or bargaining with the, Union and in retaliation for the Union filing an unfair labor practice charge, in violation of Section 8(a)(1) (4) and (5) of the Act.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2015.

II. THE FACTS

The Respondent is a nationwide food distribution business. The facility involved herein, which is located in Phoenix, services the State of Arizona and employs approximately 270 unit employees, equally divided between drivers and warehousemen. The warehouse employees work a day or night shift; the day shift employees, fewer in number than the night shift, receive merchandise and replenish the stock. The night shift employees, who report to work at about 5 p.m., select and fill the orders and load the trucks for delivery to Respondent's customers. The employees involved in this matter are night shift employees. The Union has represented certain of the employees of the Respondent, since about 2008 and the most recent collective-bargaining agreement between the parties was effective from August 21, 2011, to June 1, 2015. The parties agreed to an extension of this agreement, but on October 3, the Union wrote to the Respondent that the membership had voted to turn down its latest contract offer and to authorize a strike, although at the time of the hearing there had not yet been a strike. The hierarchy at the facility is Joe Hefley, vice president of operations, Albert Padilla has been operations manager since about October and was previously the routing department manager; and Steve Hoyt had been the operations manager prior to Padilla. Below Padilla, in the warehouse on the night shift are Supervisors Keith LaPlant, Jose Mojica, Alexis Alvarez, and "JD." Prior to his employ at the Respondent's Phoenix facility, Padilla was Operations Supervisor for the Respondent at its Los Angeles, California facility, whose employees are represented by a different Teamster local.

Ryan Proctor has been employed by the Respondent for about 12 years and is a warehouse employee on the night shift. He was on the Union's organizing committee, the Union's negotiating committee for the 2011 through 2015 contract negotiations, as well as the present negotiations, and is presently one of three shop stewards at the facility. It is initially alleged that in April, Proctor was removed from his training duties because of his union activities and that on about July 28 LaPlant threatened its employees by telling them that they were removed from training duties because of their union activities. In addition to his duties as a warehousemen, in mid-2014, Proctor was selected to be a trainer of new employees at the facility. This involved spending about 3 days with the new employee and showing them how to operate the equipment and pick the food cases, although there was no additional pay for performing this training work. Beginning in about April he stopped performing the training work and when he asked LaPlant why he was no longer training new employees, LaPlant said that he was just doing as he had been told. In July, he learned that another employee had been removed from his training duties for using Federal Medical Leave Act (FMLA) and Proctor told LaPlant that he couldn't do that, and LaPlant reinstated the employee as a trainer. He testified that later that day he asked LaPlant why he was removed from training and LaPlant said, "You want me to be honest with you?" and Proctor said that he did and LaPlant said that it was because of the position that he held. Proctor asked, "my position as a steward?" and LaPlant said, "you got it." Shortly after this conversation, Proctor memorialized it in his notebook.

LaPlant testified that he had no role in the selection of trainers and never told Proctor that he was removed from training because of his position with the Union. In about July, Proctor approached him during work and said that he had been brought down from training because of his union activities and LaPlant responded that wasn't what he was being told, that he heard ". . . that we were having some issues with getting the stuff done properly and we had to try something different because what we were doing wasn't working." Hefley testified that for 2014, the employee turnover rate for the night warehouse was 89 percent, which was the sixth worst of the Respondent's 62 facilities and that the records showed that most of the turnovers occurred within the first 90 days of employment. Although he never heard any complaints about Proctor's training, he realized that they had to change the way that they recruit and train employees, and in early 2015, he told Hoyt to get new trainers for the facility. During this period, employee Adrien James told him that he would like to be a trainer and Hefley found that he "displayed leadership qualities" and chose him to be a trainer. He testified that Proctor's position with the Union played no part in the decision to remove him as a trainer and, in fact, he has seen James wearing a union T-shirt. In 2015, the turnover rate was reduced to 46 percent, or 25th out of 62.

Elliot Garrett was employed by the Respondent as an order selector from April 2013 until January when he was terminated for excessive absenteeism for exceeding the number of permitted FMLA days. He testified that he was surprised at being terminated because he believed that all of his absent days were covered by FMLA; no grievance or unfair labor practice charge was filed regarding this discharge. On about May 27, he applied for employment at the Respondent and that request was denied. It is alleged that the Respondent refused to reemploy him because of his union activities and that on about July 12, the Respondent, by Padilla, threatened its employees that they would not be rehired and that the Respondent would not accept transfers from other facilities because of the employees' union activities. While employed by the Respondent Garrett was a member of the Union, wore a union T-shirt about once a week and during startup meetings, he would ". . . holler. . .104." In about May he saw that the Respondent's employees were working a lot of hours and he called Proctor to ask if he could get him his job back and Proctor said that he would ask Padilla. A few days later, Proctor told him that he had spoken with Padilla who said that he should put in the application ". . . and that he would get it pulled." On May 27, he received an email from the Respondent saying that they had received his employment application and ". . . are currently reviewing your experience and qualifications." On the following day he received an email from the Respondent stating that they ". . . are not moving forward with your application." After receiving this email, he told Proctor about it and Proctor told him: "That's just HR, that Albert was still looking into it." He was not rehired and did not speak to any supervisor or manager about it.

Proctor testified that after he received the call from Garrett that he would like to return to work for the Respondent, he went to Padilla's office and asked him to check to see whether Garrett was rehirable; he told him that he was in a car accident and was terminated for using unapproved FMLA leave, but was

a hard worker and a good guy and Padilla said that he would check and get back to him. On about the following day, he asked Padilla if he had checked to see whether Garrett was rehireable, and Padilla told him that he was going to check with a supervisor to vouch for Garrett's character and if it came back that he was a good person, then he would tell Proctor to tell Garrett to put in an application and he would be hired. After leaving Padilla's office, Proctor met LaPlant and told him that Garrett was applying to be rehired and that Padilla was checking on his character. LaPlant told him, "Great. I'll vouch for him. Elliot is a good dude, and a good worker." Later that evening, Proctor met Padilla, who told him that LaPlant vouched for Garrett's character and that he should tell Garrett to put in an application and to let him know when he does so. Shortly thereafter Garrett told him that his application was denied and the next day he asked Padilla why it was denied and Padilla said that he would get back to him. About a week later, on July 12, he spoke to Padilla just prior to the beginning of the shift; fellow employees Antonio Hernandez and Damasus Hardin were present at the time. Hardin began the conversation by asking Padilla how the job fair went on Saturday and if Hardin's friend, Angel Rodriguez, put in an application. Padilla responded that the job fair went well, but he didn't know if Rodriguez put in an application. Proctor then asked, "What's up with Elliot Garrett's application? Have you checked on it?" Padilla responded, "Steve Hoyt told me that he wouldn't give Elliot a second chance because he was part of the Union and that he wouldn't let two people transfer from the LA division because they were union also."[2] Proctor looked at Hernandez and Hardin and asked: "Did he really say that?" They responded, "Yeah, that's crazy." As he did with LaPlant's alleged statement about his training duties, Proctor made a note of Padilla's statement in his notebook.

Hernandez, a forklift operator on the night shift, testified that on a Sunday during the Summer, while waiting for the shift to begin, he was on the dock, in front of his forklift, with Proctor and Padilla; Hardin was on his forklift about 10 feet away. He asked Padilla how the job fair went on Saturday, and Padilla responded that it went well; about 70 applicants were there. Hernandez then asked about Rodriguez and Padilla said that he didn't know if he applied. Proctor then asked him about Garrett's employment application and Padilla said, "You know." Proctor said that he didn't know and Padilla said, "They won't even hire my boys from Cali [presumably California] "and Proctor asked why not, and Padilla answered, "Because they're Union." Padilla walked away and Hernandez asked Proctor, "That's illegal, isn't it?" and Proctor said, "yes, that's illegal." Hardin, also a forklift operator, testified that on July 12, at about 5:00, while on his forklift, he overheard a conversation between Padilla and Proctor and Hernandez; Hernandez began the conversation by asking how the job fair went and Padilla said there was a good turnout. Hardin then asked him about Rodriguez and Proctor asked about Garrett and Padilla answered, "Hey, guys, they won't even hire my guys from Cali." Proctor and Hernandez asked why, and Padilla said, "Come on guys, you know, they're union." Hardin then asked Proctor, "Isn't that against the law?" and Proctor said, "That's a Labor Board charge right there." They looked at Hernandez and asked him if he heard what was said, and he said that he did.

Padilla testified that beginning in September, when he became the operations manager, he became involved in the hiring of warehouse employees; prior to that time he was not involved in hiring night warehouse employees. However, he was shown May 22 and June 9 employment applications that state that the information had been shared with him; he testified that Julie Gaston, HR Coordinator, shares this information with Hoyt and supervisors, but that he doesn't remember receiving them. He also testified that he does not remember attending job fairs on behalf of the Respondent prior to September; however, prior to September, he made recommendations as to whether employees should be hired. In addition, employees have recommended people that should be hired, and he has suggested that the employee tell the prospective applicant to put in an application and, prior to September, he could pull or look at that application, but he never has done so and has never requested that HR pull applications to look at. Rather, he would tell the employee to send the individual's names directly to Hoyt. On June 12, he sent an email to Hoyt stating: "Can you get Julie to forward me these applications please? Solid people. Elliot Garrett,[3] Martin Llamas." He testified that he sent this email to Hoyt because Proctor referred Garrett to him and said that he had put in an application; Padilla replied that he would "follow up." The purpose of the email was to get them seen by Hoyt. The reason that he said that they were solid people was because Proctor had recommended him and ". . . he wouldn't just recommend just anybody." Subsequently, he had a conversation with Proctor about the fact that Garrett was not hired, but he cannot remember when it was, where it was, or if anybody else was present: "All that was said was . . . his application got rejected." In answer to questions from counsel for the Respondent, Padilla testified that he never told Proctor that Garrett was not being rehired because he was a member of the Union. In about July when Proctor came into his office and asked if he had any updates on Garrett's application: "At that time I told him that I believe his application was rejected due to his attendance." He also testified that he never told Proctor that he couldn't even get employees from California transferred. In fact, Juan Morales transferred from Los Angeles to Phoenix in 2014, at his request, and Daniel Valenzuela, also from the Los Angeles facility, came to the Phoenix facility in 2015, when they needed help.

Hoyt was the Director of Operations at the facility from April 2014 through October 2015; he is presently deployment manager for the Respondent. He testified that night selectors are initially hired as casual employees. The contract between the parties provides that there can be a maximum of 12 casual employees at the facility; depending upon the employees' work and attendance, they are upgraded to full-time employees. He is not involved in the prescreening of applicants and does not

[2] Proctor testified that he is aware that the employees at the Los Angeles facility are represented by a union and that Padilla and others had transferred from the Los Angeles facility to the Arizona facility.

[3] This email was sent 2 weeks after Garrett was notified that he would not be rehired.

receive the applicants' answers to the questions contained in the application; that is the work of HR: "I don't see the prescreening process." He receives a small hiring packet with a resume attached. When he received Padilla's June 12 email, he didn't pull the applications; rather, he went to Gaston, but he does not remember whether he responded to Padilla's email or what occurred when he went to see Gaston. Hoyt testified that he never told Padilla that he was not going to rehire Garrett because he was a union supporter and member.

Chad Murphy, who was the HR manager for the facility during the period in question, testified to the hiring procedure at the facility:

> The operations group determines that they need to hire a position. They contact the HR Coordinator. She'll post a position requisition that'll go on to the website. Candidates apply. And then she starts her process from there through the system.

After reviewing and screening the applications, she sends them to the department manager or supervisor who determines if they want to interview the applicant. If they do, they tell Gaston, who contacts the employee and schedules the interview.

Gaston, who performs the prescreening for all employees at the facility and is the most knowledgeable about the initial hiring process, testified that the employment applications are maintained on, and reviewed from, the Respondent's computer system, Taleo. The application contains numerous questions for the applicant to answer. The first eight questions are either yes or no; for example, "Are you legally authorized to work in the United States?" with a side notation that if the answer is yes, "The candidate passes"; if the answer is no: "The candidate is disqualified" and "Have you ever been terminated for cause?" with a notation "To be verified" if the answer was yes, and "The candidate passes" if the answer is no. The following 14 questions have notations of Required or Asset. If the applicant's answer to an Asset question is a positive one, "it would put them at the top of the list." Gaston was asked about applicants who had been terminated at their prior employment and if there was any difference depending upon the reason for the termination. She testified: "If it was a previous US Foods employee . . . I would check the system to see why they were no longer employed by US Foods. If it's not a previous US Foods employee, I would ask them." Taleo uses the term terminated for employees who left the Respondent's employ, whether they were discharged or left voluntarily, so in those situations she would ask the applicant the circumstances of the termination. Because the program only gives the reason for termination for former employees at the Phoenix facility, if the applicant worked at another of their facilities, she would contact that facility to learn the circumstances of the termination. On July 30, 2014, she sent an email to another of Respondent's facilities asking: "Garrett Shephard has applied for a position as Night Warehouse Selector at our Phoenix division. He worked for you from 10/31/11 thru 11/5/12. Can you tell me why he was terminated and if he is re-hirable?" The response she received stated: "he was a no call no show, so we would not rehire him." She also testified:

> If it's a former US Foods employee and they were termed for cause…they would be ineligible for rehire. If it's a non US Foods employee and they are qualified for the position during my phone screen I'm going to ask them. So, if it's serious, more than likely they wouldn't pass the background, but if it was attendance or something minor, because I don't know all different companies' attendance policies, I may go ahead and move them forward in the process and let the manager make that decision.

She testified to a situation in late January, early February where she rejected an applicant, Octave Gwin, in Taleo for lacking the required qualifications and later that day, Supervisor Gilbert Mendez told her that an employee told him that Gwin would be a good employee and that he wanted to interview him. Because of this request, she changed Gwin's status: ". . . that he does have the basic qualifications when, in fact, he didn't." Garrett's application review is dated May 28; on May 29, she wrote: "Status changed to reject candidate. Does not meet basic qualifications, Ineligible for rehire." The reason she rejected his application was that he had been terminated for cause by the Respondent. When she first began as HR coordinator, she was told that the Respondent does not rehire anyone who has previously been terminated for cause by Respondent's Phoenix facility and, to her knowledge, no such applicant has been hired. Further, no supervisor spoke to her about Garrett's application before she made the decision to reject it.

It is next alleged that the Respondent unilaterally changed its practice of permitting union stewards to remain in the grievance meetings, and be paid for the time, even after the start of their shifts, in violation of Section 8(a)(1)(4)(5) of the Act. The contract between the parties contains a grievance procedure; Step 2 of this procedure provides that the grievant, the business agent and the vice president of operations meet in order to attempt to resolve the grievance. The contract also states that the stewards' duties shall not interfere with the regular schedule of work. Joshua Graves, the Union's business representative, has been participating in these grievance meetings for about 3 years. Most of the night-shift warehousemen begin their shift at 5 p.m. and the grievance meetings for the night-shift employees usually begin at 4 o'clock. He testified that there are usually about two to four meetings a month and that about 98 percent of these meeting lasted for more than an hour, past 5 o'clock. From July 17 to July 21, Graves and Hefley exchanged emails about proposed dates for grievance meetings; Hefley's email to Graves, dated July 20, states: "Tuesday at this point will not work. By chance, will Thursday work? We would need to bump the time up as well as the crew starts at 5pm." On July 21, Hefley sent an email to Graves stating that they had agreed to meet on July 28 from 4–5 p.m. and August 4 from 3:30–5 p.m. It also stated: "Also, I will need the stewards to be at the shift start up meeting sharply at 5pm." Graves testified that in a telephone conversation on the prior day, Hefley told him that the stewards would no longer get paid for grievance meetings that went past 5 o'clock and that they had to be on the floor for the start of their shifts at that time. Graves responded that it had never been done that way; that stewards were always paid for their time when the meetings went past 5 o'clock and Hefley responded that the stewards would have to be on the floor at 5 o'clock.

Graves testified further that at the July 28 grievance meeting, Hefley told him that the stewards at the meeting would have to be on the floor at 5 o'clock, when their shift began. Graves responded that the practice had always been that the stewards were allowed to remain at the meetings past 5 o'clock and were paid for the time after 5 o'clock, and asked why that was changed. Hefley responded that they would not be paid. They began discussing the grievances and at 5 o'clock, before the grievance discussions had concluded, Proctor and the other steward, Frank Solis, left the meeting to go to work. On July 30, Graves wrote to Hefley:

> Per phone conversation with you and last grievance meeting on July 28, 2015 where the Company informed the Union that stewards would no longer get paid for grievance meetings and dealing with issues during their scheduled shift. This is a unilateral change and failure to bargain with the Union over these changes. Please accept this letter as official notification from Teamsters Local Union 104 demanding bargaining over these changes.

The next grievance meeting was on August 4; between July 30 and that date he did not hear from the Respondent regarding his request to bargain. At the beginning of the meeting, Hefley said that the stewards would have to be on the clock working at 5 o'clock or they wouldn't be paid, even if the meeting went past 5 o'clock. Graves asked if he would respond to his request for bargaining about it, and Hefley said that he didn't have an answer for him at that time. The meeting ended at 5 o'clock before the discussions had concluded, and Proctor and Solis left for work at that time. By letter dated August 13, Hefley wrote to Graves:

> I am writing in response to your July 30, 2015 letter in which you inaccurately represented something I said to you. I did not tell you that union stewards would no longer get paid for grievance meetings that extended into their shift. Please be advised that, if and to the extent grievance meetings extend into a union steward's shift, the Company will continue to comply with past practice and pay the union steward for that time. As no "unilateral change" has occurred I see no reason to meet to "bargain over the change."

Proctor testified that he has attended grievance meetings for 4 years and estimates that about 90 percent went past 5 o'clock before they concluded the meeting. For all these grievance meetings, except for the meetings on July 28 and August 4, he was paid for the time that the meeting went past 5 o'clock. At those meetings, Hefley told them that they would no longer go past 5 o'clock and, if they did, they would not be paid for that time. Because of that, he left the meetings at 5 o'clock before the discussions had concluded. At the meetings subsequent to August 4, he has been paid if the meetings went past 5 o'clock.

Hefley testified that at a bargaining session on May 27, there was a large stack of grievance forms on the table and, at the conclusion of the meeting, Proctor pushed them toward him and said that they were coming his way. In scheduling grievance meetings with Graves for July and August, when he sent him an email saying that they needed to bump the time up because the crew starts at 5 o'clock, he wrote that because there were a large number of grievances to discuss and he wanted to have adequate time to do so; he did not want to have "open ended meetings." He testified that the July 28 meeting concluded at about 5:20 and Proctor and Solis remained at the meeting until then and were paid for the 20 minutes that they remained. He testified further that he never told Graves that the stewards would not be paid for grievance meetings that extended into their shift.

The final allegation is that on about October 5, Michael Tavenner, transportation manager, threatened its employees by telling them that they would be discharged because they engaged in union and concerted activities. Jason Peterson, a driver employed by the Respondent, testified about this allegation, although his testimony is extremely confusing. He testified that on the morning after the Union's strike vote, Tavenner approached him at the facility and asked him if he would join him for a cigarette before lunch and Peterson said sure. Tavenner said, "Come Wednesday, you know what's going on?" Peterson replied, "Not really, I don't want to talk about it." Tavenner said "something about some union guy wants another guys job" and Peterson repeated that he didn't want to talk about it. Tavenner said: "if a vote doesn't happen or something to do with people not coming to work that . . . people lose their jobs." A few minutes later Tavenner said, "I won't have a job." When Peterson was asked to recount the conversation as well as he could he testified:

> His exact words…as I recall is we want—if this continues about people not showing up for work or striking, that people will—I don't want anyone to lose their jobs. And then he just waited for a couple of seconds and said, "well, I don't want to lose my job either."

Tavenner did not testify.

In order to establish animus, Counsel for the General Counsel introduced into evidence two pictures of Solis: one with him wearing a union shirt stating "Frank Solis selected this order" and another, apparently the same picture, but without the union shirt and the caption. Padilla testified that the first picture (with the union shirt) is a driver appreciation sheet that is placed on the employee's shipping pallets. All full-time warehousemen have such a picture, which is placed on the container labels. The second picture (without the union shirt) was when he was chosen as the Selector of the Month. On that occasion, his picture was displayed in the plant.

III. ANALYSIS

It is alleged that the Respondent violated Section 8(a)(1) of the Act on about July 28 when LaPlant told Proctor that he was removed from his training position because he was a union steward. This is based solely upon the testimony of Proctor and is denied by LaPlant, who testified that he told Proctor that he was removed from training because the company was having some issues with getting it done properly and that they wanted to try something different. This is in line with Hefley's testimony that because the facility had a high turnover rate, they had to make some changes in recruiting and training, unrelated to Proctor's work as a trainer. After observing and listening to their testimony, I credit LaPlant's testimony. I found his testi-

mony more credible and believable than Proctor's; it comports with Hefley's testimony as to why they made the change and I find it unlikely that he would make such a statement to Proctor, the union steward, when 3 months earlier he told Proctor that he was removed from his training duties because they wanted to try something different. I therefore recommend that this allegation be dismissed. It is also alleged that Proctor was removed from his position as a trainer because of his union activities, in violation of Section 8(a)(3) of the Act. Under *Wright Line,* 251 NLRB 1083 (1980), the initial issue is whether Counsel for the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in Respondent's decision. If that has been established, the burden shifts to the Respondent to establish that it would have taken the same action even in the absence of the protected conduct. I find that Counsel for the General Counsel has not sustained her initial burden. As I have discredited Proctor's testimony regarding LaPlant's alleged statement, there is no evidence to support this allegation. Hefley's testimony regarding the facilities high turnover rate is a reasonable explanation for the change. Further, Proctor has been an active union member, a member of the Union's organizing and bargaining committees, and a union steward since about 2008, and yet in 2014, the Respondent chose him to be a trainer with knowledge of these activities. As there is no credible evidence that his union activities were a motivating factor in the decision to remove him from his training duties, I recommend that this allegation be dismissed.[4]

It is next alleged that in May the Respondent refused to rehire Garrett because of his union activities and that on July 12 Padilla said that they didn't rehire him because he was part of the Union and that the Respondent would not allow employees to transfer from Los Angeles to the facility because they were Union. Although I have previously discredited Proctor's testimony about the alleged statement by LaPlant, and find it generally unlikely and surprising for a supervisor to make such a statement to an active union supporter, in this situation I credit his testimony because it is supported by the testimony of Hernandez and Hardin, whom I found to be credible while I did not find Padilla to be a credible witness because he appeared to be evasive in his answers to questions from Counsel for the General Counsel and often claimed that he could not remember subjects and conversations that he should have remembered. I therefore find that Padilla did make this statement to Proctor, Hernandez and Hardin, and find that it violates Section 8(a)(1) of the Act. *J.L. Phillips Enterprises*, 310 NLRB 11, 13 (1993)*; Skyline Builders, Inc.,* 340 NLRB 109, 115 (2003).

It is further alleged that the failure to hire (or rehire) Garrett violates Section 8(a)(1)(3) of the Act. Although I credited Proctor, Hernandez and Hardin that Padilla said that Garrett was not hired because he was part of the Union, I do not believe the statement to be true. There are a number of reasons for this finding. While I cannot explain why Padilla would make this statement, the evidence so clearly establishes that Garrett was not rehired for nondiscriminatory reasons, that I find Padilla's statement was not true. First, I found Hoyt to be a credible and believable witness and he testified that he never made that statement to Padilla. Further, the other part of Padilla's statement that they would not allow employees to transfer from Los Angeles was not true as the uncontradicted testimony establishes that Morales transferred from the Los Angeles facility to the Phoenix facility in 2014, and Valenzuela came to the facility in 2015, when they needed assistance. Other facts also convince me that Counsel for the General Counsel has not sustained her initial burden under *Wright Line*. One is that Garrett's union activities were extremely limited: once a week he wore a union T-shirt and during startup meetings he hollered "104." Further, he was terminated for excessive absenteeism in January and reapplied only 4 or 5 months later. Absent a pretextual reason for the refusal to rehire, which I do not find here, it is not unreasonable for an employer to refuse to rehire an employee it had discharged 4 or 5 months earlier. And finally, I found Gaston to be a totally credible witness in describing her method of vetting the employment applications. She testified that when she began her employment as HR coordinator, she was told that the Respondent does not rehire anyone who had previously been terminated by the Respondent at the facility and to her knowledge, no such applicant has been rehired, and that she made the decision to reject his application without consulting with anybody about it: "If they had been termed for cause, I was told that they are not rehirable so there was no sense in checking with anybody on that." Further, the exchange of emails with another facility on July 30, 2014, supports her testimony that employees of the Respondent who had been terminated, are not eligible for rehire. I therefore recommend that this allegation be dismissed. *Aim Royal Insulation, Inc.*, 358 NLRB 787 (2012).

It is next alleged that the Respondent violated Section 8(a)(1)(4)(5) of the Act by changing its practice of permitting union stewards to remain in, and be paid for, grievance meetings that continue past their 5 o'clock start time. I found Graves to be a credible witness whose testimony was supported by Proctor and documentary evidence. All parties agree that the practice had been that union stewards who attended grievance meetings were permitted to remain at the meetings that continued after 5 o'clock and that they would be paid for the time that they remained at the meeting, beginning at 5 o'clock. Regardless of Hefley's denials, the evidence clearly establishes that in July and August the Respondent changed this longstanding practice without prior negotiations with the Union. In emails to Graves he stated: "as the crew starts at 5pm" and "I will need the stewards to be at the shift start up meeting sharply at 5pm." In addition, I credit Graves' testimony that in a telephone conversation, Hefley told him that the stewards would no longer get paid for grievance meetings that went past 5 o'clock and told him at the July 28 grievance meeting that the stewards at the meeting would have to be on the floor at 5 o'clock, when their shift began. Further solidifying this finding is that it took Hefley 2 weeks to respond to Graves' July 30 letter requesting bargaining about this issue; if there really had been no change,

[4] Counsel for the Respondent, in his brief, defends that the decision to remove Proctor from his training duties did not materially his employment and therefore it does not constitute an "adverse employment action." However, I need not decide that issue as I have recommended that this allegation be dismissed for other reasons.

it is reasonable to assume that he would have replied immediately. I therefore find that this change violates Section 8(a)(1)(5) of the Act. *Dearborn Country Club,* 298 NLRB 915 (1990); *Pepsi America, Inc.*, 339 NLRB 986 (2003). As there is no evidence that it resulted from unfair labor practice charges filed by the Union other than the fact that the initial unfair labor practice charge was filed 11 days before the July 28 grievance meeting, I recommend that the 8(a)(1)(4) allegation be dismissed.

The final allegation is that Tavenner's statements to Peterson on October 5 violate Section 8(a)(1) of the Act. It is, of course, a violation to threaten employees with discharge for engaging in a strike, *Baddour, Inc.,* 303 NLRB 275 (1991), but the testimony is so confused that I cannot find such a threat in Peterson's testimony. Tavenner said that if employees don't come to work, "people lose their jobs" and that he (Tavenner) could lose his job, but there was no clear threat in his statement. I therefore recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) by threatening employees that they would not be rehired and that employees would not be permitted to transfer from the Respondent's Los Angeles, California facility because of their union activities.
4. The Respondent violated Section 8(a)(1)(5) of the Act by changing its procedure of permitting union stewards to remain at grievance meetings past their shift startup time, and to be paid for that time, without prior negotiations with, or agreement of, the Union.
5. I recommend that the remaining allegations contained in the consolidated complaint be dismissed.

THE REMEDY

Having found that Padilla's threat that employees would not be rehired and that employees could not transfer from the Los Angeles facility to the Phoenix facility violated Section 8(a)(1) of the Act, and that the Respondent unilaterally changed its procedure of permitting union stewards to remain in grievance meetings past their startup time, and to be paid for that time, I recommend that the Respondent cease and desist from engaging in this action and post a notice to this effect.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[5]

ORDER

The Respondent, US Foods, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that they will not be rehired, and that employees will not be permitted to transfer to the facility because of their union or concerted activities.

(b) Changing any term and condition of employment of its unit employees without prior bargaining with the Union.

(c) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order notify the Union, in writing, that it is an established term and condition of employment at the Phoenix facility for union stewards to be allowed to remain at grievance meetings that go past their startup times, and to be paid for that time, and that this procedure will not be changed without prior bargaining with the Union.

(b) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 10, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees that they will not be hired or rehired or be permitted to transfer from our Los Angeles, California facility to our Phoenix, Arizona facility because of their activities on behalf of General Teamsters State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union) or any other labor organization.

WE WILL NOT change existing terms and conditions of employment without prior notice to, and bargaining with, the Union. WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Union, in writing, that union stewards are permitted to remain at grievance meetings, past their startup time, and to be paid for this time until the conclusion of the meetings.

US FOODS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-156203 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.